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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)

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THE PEOPLE,  
  
Plaintiff and Respondent,  
  
v.  
  
MARCELINO SILVA,  
  
Defendant and Appellant.

C069793  
  
(Super. Ct. No.  
09F09373)

Defendant Marcelino Silva, an inmate at Folsom State Prison serving a life term for murder, slashed a fellow inmate with a razor blade. A jury convicted defendant of assault with a deadly weapon with malice aforethought by a life prisoner (Pen. Code,<sup>1</sup> § 4500) and possession of a sharp instrument by an inmate (§ 4502). The trial court found true allegations that defendant had suffered two prior strike convictions (§ 667, subds. (b)–

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<sup>1</sup> Further undesignated statutory references are to the Penal Code.

(i); 1170.12) and sentenced him to 27 years to life in prison. He appealed.

On appeal, defendant claims instructional error and that the trial court abused its discretion in failing to strike one of his strikes. Finding no error, we shall affirm.

### **FACTS**

Correctional Officer Randy Wahl was on duty in the yard at Folsom State Prison when he saw a fight in the "alley" between two buildings. He called in an alarm over the radio. He ran toward the alley and ordered all inmates down. Defendant was running. Wahl stopped defendant, handcuffed him, and made a cursory search, but found no contraband. There appeared to be a blood stain on defendant's shirt and a cut on his right index finger.

Officers responding to the alarm saw another inmate, Saustegui, on the ground bleeding from his face. Saustegui had open wound lacerations to the left side of his neck and his left cheek bone. His wounds required stitches. A razor blade from a disposable razor was found in the yard with wet blood on it.

A security camera recorded the incident; the recording was played for the jury at trial.

### **DISCUSSION**

#### **I**

#### *Instructional Error*

Defendant contends it was error for the trial court to instruct the jury on implied malice. He argues the specific intent requirement of section 4500 cannot be satisfied by

implied malice. He asserts section 4500 "in effect, it is a murder/attempted murder statute." He contends a violation of section 4500 where the victim does not die, like attempted murder, requires a specific intent to kill, a mental state inconsistent with implied malice.

We are not persuaded by defendant's attempt to analogize his assault charge to murder and attempted murder charges. Section 4500 is an assault statute, not a murder statute. (See *People v. McNabb* (1935) 3 Cal.2d 441, 458 [explaining that the predecessor statute "was enacted as a disciplinary regulation and as a means of protection to prisoners themselves against the assaults of the vicious, and also to protect the officers who are required to mingle with the inmates, unarmed"].) It proscribes "assault upon the person of another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury," when committed by a life-term inmate with malice aforethought. It does not require intent to kill. The subsequent death of the victim (within a year and a day) is relevant only in determining the penalty. If the victim dies, the punishment is death or life imprisonment without the possibility of parole; if the victim does not die, the punishment is life without the possibility of parole for nine years. (§ 4500.)

The assault offense defined in section 4500 requires the specific intent of malice aforethought. (*People v. Jeter* (2005) 125 Cal.App.4th 1212, 1217 (*Jeter*).) "The words malice aforethought in section 4500 have the same meaning as in

sections 187 and 188. [Citations.] Thus the rules that have evolved regarding malice aforethought as an element in a charge of murder apply to section 4500." (*People v. Chacon* (1968) 69 Cal.2d 765, 781 (*Chacon*), disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) "Malice, for the purpose of defining murder, may be express or implied." (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 102.)

Under section 188, which defines malice aforethought for purposes of the murder statute, express malice is present "when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature." Malice is implied "when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." (§ 188.) "The statutory definition of implied malice has never proved of much assistance in defining the concept in concrete terms." (*People v. Dellinger* (1989) 49 Cal.3d 1212, 1217.) Our high court has "interpreted implied malice as having 'both a physical and a mental component. The physical component is satisfied by the performance of "an act, the natural consequences of which are dangerous to life." [Citation.] The mental component is the requirement that the defendant "knows that his conduct endangers the life of another and . . . acts with a conscious disregard for life." [Citation.]' [Citation.]" (*People v. Chun* (2009) 45 Cal.4th 1172, 1181 (*Chun*)).

"Malice aforethought as used in section 4500 has the same meaning as it has for murder convictions, requiring either an

intent to kill or 'knowledge of the danger to, and with conscious disregard for, human life.' [Citations.]" (*Jeter, supra*, 125 Cal.App.4th at p. 1216.) Here, the trial court instructed the jury in a manner consistent with this meaning-- that a violation of section 4500 required a specific intent and the specific intent required would be explained in the instruction for that crime. The jury was then instructed in the language of CALCRIM No. 2720, that defendant had been charged with "assault with a deadly weapon with malice aforethought, while serving a life sentence in violation of Penal Code section 4500." The instruction set out the elements of the offense, including that "the defendant acted with malice aforethought." It then defined malice aforethought:

"There are two kinds of malice aforethought, express malice and implied malice. Proof of either is sufficient to establish the state of mind required for this crime. [¶] The defendant acted with express malice if he unlawfully intended to kill the person assaulted. [¶] The defendant acted with implied malice if, one, he intentionally committed an act; two, the natural consequences of the act were dangerous to human life; three, at the time he acted, he knew his acts were dangerous to human life; and four, he deliberately acted with conscious disregard for human life."

This definition of malice aforethought is the same as that required for murder. (See *Chun, supra*, 45 Cal.4th at p. 1181; CALCRIM No. 520.) Thus, in accordance with *Chacon, supra*, the trial court defined malice aforethought for purposes of section

4500 using the same definition applicable in murder cases. The inclusion of a definition of implied malice was proper; the trial court correctly instructed the jury.

## II

### *Romero Motion*

Defendant contends the trial court abused its discretion in refusing to strike one of defendant's prior strikes. While conceding a "significant" criminal history, defendant contends he is not within the spirit of the three strikes law. Defendant notes his two strikes--for murder and attempted murder--arose from a single incident, where he fired multiple times into a car containing boisterous men, killing one. He also argues a two-strike sentence of 18 years to life would be ample punishment for his crime.

In the furtherance of justice, a trial court may strike or dismiss a prior conviction allegation. (§ 1385, subd. (a); *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.) "[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, 'in furtherance of justice' pursuant to Penal Code section 1385(a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been

convicted of one or more serious and/or violent felonies.”

(*People v. Williams* (1998) 17 Cal.4th 148, 161.)

A trial court’s refusal to strike a prior conviction allegation is reviewed under the deferential abuse of discretion standard. (*People v. Carmony* (2004) 33 Cal.4th 367, 375 (*Carmony*)). “[T]he three strikes law not only establishes a sentencing norm, it carefully circumscribes the trial court’s power to depart from this norm and requires the court to explicitly justify its decision to do so. In doing so, the law creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper.” (*Carmony, supra*, 33 Cal.4th at p. 378.) Here, we find no abuse of discretion.

That defendant’s two strikes arose from the same brief crime spree does not require striking one of them. In *People v. Benson* (1998) 18 Cal.4th 24, 36, at footnote 8, our Supreme Court suggested there might be “circumstances in which two prior felony convictions are so closely connected--for example, when multiple convictions arise out of a single act by the defendant as distinguished from multiple acts committed in an indivisible course of conduct--that a trial court would abuse its discretion under section 1385 if it failed to strike one of the priors.” Here, defendant’s two strikes did not arise from a single act; he fired a gun at least eight times, stopping to reload, at two men that he perceived had “talked back” to him, firing until one victim was dead and the other had escaped by crawling out of the other side of the car he was sitting in. Defendant’s conduct

constituted multiple acts of violence, properly resulting in multiple counts of conviction, properly resulting in two strikes.<sup>2</sup>

As defendant acknowledges, the trial court “conscientiously considered and ruled on” defendant’s *Romero* motion. The court considered that defendant’s prior convictions all involved violence. In 1991, he repeatedly fired his gun into a car, committing murder. He had suffered two misdemeanor convictions for spousal abuse and battery. While in prison, he had several serious rule violations. His potential for violence was such as to require shackling at trial. His current conviction was for assault with malice, slashing his victim’s throat, and the trial court believed from reviewing the recording that defendant intended to kill his victim.

The purpose of the three strikes law is “to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses.” (§ 667, subd. (b); see *People v. Strong* (2001) 87 Cal.App.4th 328, 338.) Defendant’s pattern of violent behavior, spanning over two decades and continuing while

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<sup>2</sup> Further, even if the same act were involved, the trial court would not be *required* to strike a strike. The “same act” circumstance is only a factor for the court to consider, not a mandate for striking a strike. (*People v. Scott* (2009) 179 Cal.App.4th 920, 931.) We decline to follow *People v. Burgos* (2004) 117 Cal.App.4th 1209, 1214, which held “that the failure to strike one of the two prior convictions that arose from a single act constitutes an abuse of discretion.”



defendant was incarcerated, amply supports the trial court's well-reasoned conclusion that defendant was not outside the spirit of the three strikes law.

**DISPOSITION**

The judgment is affirmed.

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DUARTE, J.

We concur:

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BLEASE, Acting P. J.

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HULL, J.